

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
IP-Enabled Services)	CC Docket No. 04-36
)	

**INITIAL COMMENTS OF THE
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION**

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

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SUMMARY

Today the vast majority of Americans use their landline and wireless telephones to place and receive voice calls. Over the next several years there will be some migration of voice communications from landline and wireless telephone service to voice over Internet protocol (VoIP) service. During this migration there will be a significant number of VoIP originated calls terminating on the public switched telephone network (PSTN). Until the day when all American households and businesses completely migrate from the PSTN to an IP-network to place and receive calls, which may take decades, there will always be VoIP call traffic using and imposing costs onto the PSTN. Even if all VoIP and IP-enabled services were accommodated on broadband-only-facilities, the costs of these facilities are still higher in rural areas. Some form of access and/or universal service will be needed to ensure that rural consumers continue to receive access to advanced telecommunications and information services that are reasonably comparable in urban and rural areas of the United States.

Recognizing that the transition of all voice communications to an IP-only platform will not occur in a flash cut, NTCA urges the Commission to take a flexible and evolving approach to deciding the issues related to the regulatory classification and level of regulation placed on specific types of VoIP and IP-enabled services. NTCA recommends that the Commission apply the following competitively neutral principles when considering the issues in this proceeding.

First, to the extent that VoIP and IP-enabled service providers use the PSTN to originate or terminate voice calls they should be subject to the same inter-carrier compensation obligations as interexchange carriers (IXCs), irrespective of whether the traffic originates on the PSTN, on an IP network, on a wireless network, or on a cable network. Second, all VoIP and IP-enabled service providers, regardless of their VoIP service's regulatory classification as an "information

service”, “telecommunications service,” “cable service,” or “wireless service,” should be required to contribute to the universal service fund (USF) to ensure that all Americans have access to affordable communications services. Third, the Commission should require VoIP providers to adhere to similar regulatory obligations to provide consumers with 911 service, CALEA compliance and disability access, or require VoIP providers to provide other alternatives that meet the public’s interest in security and safety. Fourth, the Commission should allow for the possibility that some VoIP and IP-enabled services may fall under exclusive state jurisdiction or shared state and federal jurisdiction. Fifth, the Commission should expand the list of USF contributors to include cable, wireless and satellite broadband Internet access service providers and facilities-based and non-facilities-based VoIP/IP-enabled services providers to ensure all Americans, rural and urban, have access to affordable and comparable communications services.

Regulation is necessary in order to provide for equitable and non-discriminatory compensation to underlying carriers that provide VoIP providers access to their networks to complete VoIP originated calls. Simply because VoIP providers use an IP-network platform to provide voice communications, the Commission should not grant VoIP providers with Most Favored Nation (MFN) status and give them a free pass on access charges. This will only create an unfair competitive advantage in favor of VoIP providers in the highly competitive voice communications market. VoIP providers and competing voice providers using different network platforms all impose terminating traffic costs on rural ILECs. In order to adhere to the Commission’s principle of competitive neutrality, the Commission must require all VoIP and IP-enabled service providers to pay access charges.

Existing VoIP providers, such as Vonage, Inflexion, and Level 3, currently do not make universal service fund (USF) contributions. As VoIP calls move more voice minutes off the

PSTN, these lost minutes and revenues assessed for USF funding will increase the overall USF contribution burden on existing landline and wireless telecommunications carriers. Over time, this will make it more and more difficult for some small, high-cost, rural ILECs to recover the cost of their total network facilities. Consequently, some high-cost ILECs that provide the high-speed Internet connections may not have enough access revenues and/or USF support to cover their costs. Without these rural networks many consumers in high-cost rural areas would be left without landline, wireless and/or cable telephone and broadband service. To avoid this outcome, NTCA urges the FCC to require all VoIP/IP-enabled service providers to contribute to the universal service fund to support the underlying networks that enable broadband Internet access to carry VoIP traffic.

The Commission should further require all VoIP providers to adhere to similar regulatory obligations concerning 911, CALEA and disability access services. VoIP consumers deserve the same protections that other voice carriers are forced to provide. Landline, wireless, cable and VoIP providers provide similar voice services. No provider of voice communications services, regardless of the technology used to provide the service, should have an unfair competitive advantage in the marketplace. Imposing similar 911, CALEA and disability access obligations on VoIP providers will promote the public health and safety and ensure competitive neutrality.

NTCA also urges the Commission to refrain from making a blanket ruling that it has exclusive federal jurisdiction over all VoIP and/or IP-enabled services. The Commission has recognized that if an information service is characterized as “purely intrastate” or it is practically and economically possible to separate interstate and intrastate components of a jurisdictionally mixed information service without negating the federal objectives, state commission jurisdiction could apply over such services. With the creation of new IP-based services and their tracking

mechanisms there will likely be some “purely intrastate” VoIP and IP-enabled services and the ability to track the intrastate and interstate components of these services. The Commission should therefore allow for the possibility that some VoIP and IP-enabled services may fall under exclusive state jurisdiction or shared state and federal jurisdiction.

The Commission should also eliminate the enhanced service provider (ESP) exemption for Internet service providers (ISPs), which provides ISPs with an exemption from access charges and USF contributions. With the implementation of the CALLS and MAG access reform plans for non-rural and rural ILECs, access charges have been reduced to historical lows and are based on cost. At the same time, ISP usage of the PSTN has continued to increase dramatically and has placed a significant and rapidly growing cost burden on ILECs without adequate compensation for ISP usage. If VoIP services are added to the list of services exempt from access charges and USF contributions, the entire universal service funding system will be at risk of collapsing. The Commission should therefore remove the ESP exemption and require all ISPs and VoIP service providers using the PSTN to pay access charges and universal service contributions.

Finally, just as the current definition of universal service must evolve to keep pace with consumer needs and evolving technology, so must the USF assessment base. The universal service support ensures comparable and affordable services throughout the Nation. Cable, wireless and satellite broadband Internet access providers and facilities-based and non-facilities-based VoIP and IP-enabled services providers will benefit from the nationwide network made possible by universal service. They should therefore all contribute. Expanding the list of contributors to the fund will be critical to this Nation’s continued success in providing all Americans, rural and urban, access to affordable and comparable communications services.

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**INITIAL COMMENTS OF THE
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION**

The National Telecommunications Cooperative Association (NTCA)¹ hereby submits its Initial Comments in response to the Federal Communications Commission's (Commission or FCC) *Notice of Proposed Rulemaking* (NPRM) in the above-captioned proceeding.²

I. INTRODUCTION

On March 10, 2004, the Commission released its NPRM concerning issues related to services and applications making use of Internet protocol (IP), including but not limited to voice over IP (VoIP) services. The Commission's stated goal in this proceeding is "to facilitate the transition to IP-enabled communications networks, relying whenever possible on competition and applying discrete regulatory requirements only where such requirements are necessary to fulfill important public policy objectives."³ In working towards this goal the FCC seeks to lightly regulate VoIP and other IP-enabled service providers while at the same time preserve

¹ NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents more than 560 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service incumbent local exchange carriers (ILECs) and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA's members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

² *In the Matter of IP-Enabled Services, Notice of Proposed Rulemaking* (NPRM), WC Docket No. 04-36, FCC 04-28 (rel. March 10, 2004).

³ NPRM, ¶ 5.

universal service and maintain equitable compensation for a provider's use of another provider's facilities that make up the public switched telephone network (PSTN). As part of the policy for reaching this goal the Commission believes "that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network."⁴ NTCA supports this guiding principle and endorses the Commission's policy "that the cost of the PSTN should be borne equitably among those that use it in similar ways."⁵

The Commission also seeks comment on the regulatory classification of VoIP and other IP-enabled services, the level of regulation that should be placed on IP-services providers concerning public safety, disability access, inter-carrier compensation and universal service, and whether state and/or federal jurisdiction should apply to these service providers. Specifically, the Commission seeks comment on (1) what regulations, if any, would apply to each class of IP-enabled services; (2) for services classified as "telecommunications services," should the FCC use its forbearance authority to remove a providers' obligation to pay access charges and universal service contributions; and (3) for services classified as "information services," should the FCC exercise its ancillary jurisdiction to impose a particular obligation, such as the payment of access charges and universal service contributions.⁶

The Commission should take a flexible, transitional and evolving approach when deciding these issues. NTCA urges the Commission to apply the following competitively neutral

⁴ NPRM, ¶ 33.

⁵ Id.

⁶ NPRM, ¶ 74.

principles.⁷ First, to the extent that VoIP or IP-enabled service providers use the PSTN to originate or terminate voice calls they should be subject to the same inter-carrier compensation obligations as IXC's, irrespective of whether the voice traffic originates on the PSTN, on an IP network, on a wireless network, or on a cable network. Second, all VoIP and IP-enabled service providers, regardless of their classification as an "information service," "telecommunications service," "wireless service," or "cable service," should be required to make USF contributions to ensure that all Americans have access to affordable telecommunications and information services. Third, the Commission should require VoIP providers to adhere to similar regulatory requirements that provide consumers with 911 service, CALEA compliance and disability access, or require VoIP providers to provide other alternatives that meet the public's interest in security and safety. Fourth, the Commission should allow for the possibility that some VoIP and IP-enabled services may fall under exclusive state jurisdiction or shared state and federal jurisdiction. Fifth, the Commission should expand the list of USF contributors to include cable, wireless and satellite broadband Internet access service providers and facilities-based and non-facilities-based VoIP/IP-enabled services providers to ensure all Americans, rural and urban, have access to affordable and comparable communications services.

II. ALL VoIP AND IP-ENABLED SERVICE PROVIDERS THAT ORIGINATE AND/OR TERMINATE TRAFFIC ON THE PSTN SHOULD BE REQUIRED TO PAY ACCESS CHARGES, REGARDLESS OF THE REGULATORY CLASSIFICATION OF THE SERVICE

Today there are approximately 180 million telephone access lines serving residential and business customers throughout the United States and 95 percent of American households

⁷ The FCC's principle of competitive neutrality requires that rules neither unfairly advantage or disadvantage one provider over another and neither unfairly favor or disfavor one technology over another.

subscribe to telephone service.⁸ In comparison, there are approximately 300,000 residential broadband customers using VoIP service in the USA today.⁹ Vonage currently provides VoIP service to approximately 150,000 customers and is adding roughly 20,000 new VoIP customers per month.¹⁰ In addition, there are currently 3-4 million VoIP business customers in the United States.¹¹ VoIP customers are approximately two percent of the 180 million access lines in America today. Some analysts predict that this percentage will quadruple to eight percent by the end of 2004.¹²

For VoIP service to continue to grow in the United States, VoIP providers must rely on their targeted customers' pre-existing or future DSL, cable, wireless or satellite broadband connections to the Internet. Less than 25 percent of U.S. households, however, have access to DSL, cable-modem, wireless, satellite, or power company broadband high-speed Internet access service today.¹³ Of this percentage, less than 10 percent of all American households currently subscribe to the broadband service needed for VoIP service to work.¹⁴ Given that the vast majority of Americans are still using PSTN telephone service and given the fact that approximately 75 percent of U.S. households do not have access to broadband today, there will be a significant number of VoIP calls terminating on the PSTN for many years to come. Because it may likely take more than a decade before 90+ percent of all American households have access

⁸ Telephone Subscribership in the United States, FCC Report, Industry and Analysis Division, Wireline Competition Bureau, (rel. May 2004).

⁹ Jeffrey Carlisle, Deputy Chief, FCC Wireline Competition Bureau, speaking at NTCA's VoIP Possibilities Conference in Saint Louis, Missouri on May 5, 2004.

¹⁰ Id.

¹¹ Id.

¹² Warren Communications News, Telecom Notebook, citing research from New Paradigm Resources, May 18, 2004.

¹³ Other nations zip by USA in high-speed Net race, USA Today, January 21, 2004, http://www.usatoday.com/money/industries/technology/2004-01-19-broadband_x.htm.

¹⁴ FCC Report on the Availability of High-Speed and Advanced Telecommunications Capability, CC Docket No. 98-146, FCC 02-33, (rel. Feb. 6, 2002).

and subscribe to broadband, the interaction between VoIP service and the PSTN will continue well into the future.¹⁵ Even if all VoIP and IP-enabled services were accommodated on broadband-only-facilities, the costs of these facilities are still higher in rural areas. Some form of access and/or universal service will be needed to ensure that rural consumers continue to receive access to advanced telecommunications and information services that are reasonably comparable in urban and rural areas.¹⁶

Access and universal service obligations fall principally and mandatorily on “telecommunications service” providers in recognition of the fact that they benefit from the nationwide communications system. VoIP and IP-enabled service providers should not be excused from these obligations under the guise that they will be shackled by regulation. The imposition of access and universal service obligations on these providers does not create a scheme of pervasive regulation of entry or rates.

Understanding that a significant portion of VoIP calls will terminate on the PSTN well into the next decade, the cost that VoIP imposes on the PSTN must be borne equitably among those that use the PSTN in similar ways.¹⁷ When VoIP users place and receive voice calls utilizing a rural ILEC’s originating and terminating switching facilities they are using the ILEC’s switching facilities in the same manner that IXC’s use these facilities for interstate voice traffic. The costs imposed on the underlying rural ILEC are the same regardless of whether the call is a

¹⁵ For example, a Vonage subscriber with a broadband connection can place and receive calls from other Vonage customers and traditional PSTN customers. When a Vonage customer communicates with a subscriber of ordinary telephone service, Vonage converts its customers IP packets into digital TDM (time division multiplexed) format for transfer through a media gateway to the PSTN and vice versa. If a Vonage customer communicates with another Vonage customer this transmission does not utilize the PSTN and Vonage servers use Session Initiation Protocol (SIP) to direct the call to the other customer’s personal computer or multimedia terminal adapter (MTA).

¹⁶ Section 254(b)(3) of the Act.

¹⁷ NPRM, ¶61.

VoIP call, an IP-enabled call, or a traditional IXC call. Providers of VoIP or other IP-enabled services that originate and/or terminate traffic on the PSTN should therefore pay the same access charges that IXCs pay for their use of underlying ILEC networks.

Moreover, exempting VoIP providers from paying access charges would force rural ILECs to either unjustly raise their customer rates to recover costs imposed on their networks by VoIP providers or incur substantial revenue losses. Rural ILEC consumers would have no protection from either higher end-user rates, degradation in the quality of their underlying ILEC network, or the possible loss of their carrier of last resort. Rate shock and potential loss of subscribers to the PSTN and IP networks would be a very real possibility, particularly for lower income consumers who do not qualify for LifeLine or Linkup support and who cannot afford a high-speed Internet access connection: specifically, working families who currently can afford ILEC telephone service and/or dial-up Internet service but cannot afford the high-speed Internet access connection that VoIP providers must have in order to offer voice service.

The Commission's rules currently require that providers of traditional long distance services pay fair compensation for using the public switched network.¹⁸ The Commission has stated that when a "provider of IP-enabled voice services contracts with an IXC to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges."¹⁹ The

¹⁸ Statement of Chairman Michael K. Powell, *In the Matter of IP-Enabled Services, Notice of Proposed Rulemaking*, WC Docket No. 04-36 (rel. March 10, 2004).

¹⁹ In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, ¶19, WC Docket No. 02-361, FCC 04-97 (rel. April 21, 2004); *Also See* 47 C.F.R. § 69.5(b) (imposing access charges on "interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services"). Depending on the nature of the traffic, carriers such as commercial mobile radio service (CMRS) providers, incumbent LECs, and competitive LECs may qualify as interexchange carriers for purposes of this rule.

Commission has also stated that its analysis “applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport.”²⁰ NTCA urges the Commission to rule that when a VoIP or IP-enabled service provider originates a voice call on high-speed Internet connection and sends the call to the PSTN to terminate, the call will be subject to same compensation obligations that apply to landline, wireless, and cable providers, irrespective of whether the call is classified as an information service, telecommunications service, wireless service or cable service.

So long as VoIP providers continue to terminate calls on the PSTN, access charges should apply to these voice calls. Interstate and intrastate communications services, IP-enabled or not, that use the PSTN in ways that are indistinguishable from the ways that IXC, ILECs, CLECs, cable telephony and wireless carriers use of the PSTN should receive the same regulatory treatment. The Commission’s order concerning AT&T’s IP-assisted voice service makes clear that use of IP technology in a network does not change the nature of a basic telecommunications service.²¹ In other words, the protocol conversion to facilitate basic voice service does not convert the service to an enhanced service.²² The same is true for services that originate with broadband connections and terminate on the PSTN. VoIP providers must account for their use and need of the PSTN, and the carriers that make up the PSTN must be able to recover the network costs imposed on them by VoIP providers.

²⁰ *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, ¶19, WC Docket No. 02-361, FCC 04-97 (rel. April 21, 2004).

²¹ *Id.*

²² *Id.*

III. All VoIP AND IP-ENABLED SERVICE PROVIDERS SHOULD CONTRIBUTE TO THE UNIVERSAL SERVICE FUND REGARDLESS OF THE REGULATORY CLASSIFICATION OF THEIR SERVICE

All VoIP and IP-enabled service providers should contribute to the federal universal service fund mechanisms, regardless of the regulatory classification of their sepecific type of service as an information service, telecommunications service, wireless service, or cable service. Under the Commission's existing contribution rules, wireline and wireless carriers providing telecommunications services, are required to make USF contributions to the extent they provide retail voice service to end-users.²³ In the absence of a decision on whether VoIP providers are carriers offering "telecommunications services," the rules do not apply to VoIP carriers providing virtually the same retail voice communications services.²⁴ From the customer's perspective, a VoIP provider that offers voice services to the public for a fee provides the same service as those offered by competing telecommunications, wireless, cable, satellite and municipal companies. There services are classified as "telecommunications services" subject to the obligations of sections 254(d) and 254(b)(4). Section 254(b)(4) requires that the Commission treat all providers of voice services indiscriminately for USF assessment purposes.²⁵

VoIP providers use their platforms to provide voice service in direct competition with ILECs, CLECs, cable and wireless providers. None of these VoIP providers, however, have the same universal service obligations as their competitors. Contribution policies and rules should change in order to eliminate the distinct competitive advantage these companies have over

²³ *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, *Universal Service Obligations of Broadband Providers*, and *Computer III Further Remand Proceeding: Bell Operating Company Provision of Enhances Services: 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Dockets Nos. 95-20, 98-10, FCC 02-42, Notice of Proposed Rulemaking (NPRM) ¶¶ 71 and 72 (rel. Feb. 15, 2002).

²⁴ *Id.* ¶ 79.

²⁵ See also, *Id.*

contributing companies, as well as the drain VoIP providers will impose on the interstate revenue USF assessment base.²⁶ Even if the Commission is not prepared to define certain VoIP and IP-enabled services as “telecommunication services,” it has the ability to assess the services to further its universal service goals. Section 254(d) specifically provides the Commission with permissive authority to require “any other provider of interstate telecommunications” to contribute to universal service. NTCA urges the Commission to exercise this authority and immediately require VoIP service providers to contribute to the federal universal service mechanisms.

Most VoIP providers, including AT&T, Vonage, Inflexion, and Level 3, charge customers a fee for sending and receiving voice calls. VoIP providers also use North American Numbering Plan (NANP) telephone numbers to facilitate voice calls throughout the PSTN. And they use the PSTN in the same way as other carriers who pay access and contribute to universal service in recognition of the fact that their use imposes costs on the underlying carrier networks that makeup the PSTN. The fact that VoIP providers use the PSTN, use NANP telephone numbers, and charge customers for voice service, clearly demonstrates that this service should be required to pay USF contributions. The goals of universal service cannot be met without the broad support for the underlying networks that carry their VoIP as well as circuit switched traffic.

To the extent that the Commission is concerned about competitive neutrality and the sustainability of an adequate revenue base for its interstate USF mechanisms, it should require all VoIP/IP-enabled service providers to contribute to USF on an equitable and non-discriminatory

²⁶ *First Report and Order*, CC Docket 96-45, 12 FCC Rcd 9183-9184, ¶795.

basis.²⁷ The Commission's rules should keep pace with competition as competitors use different facilities and technologies as substitutes for traditional circuit switched telecommunications services and broadband Internet access services. Failing to position VoIP and IP-enabled service providers on equal footing with existing contributors will continue to place existing contributors at a distinct competitive disadvantage and further drain revenues from the existing contribution revenue assessment base. Without competitive neutrality, the disparate regulatory treatment of VoIP and IP-enabled services will invite arbitrage and create false economic incentives that will undermine the very networks that make up the PSTN and carry VoIP traffic. As more voice calls migrate to VoIP providers, the viability of universal service will be in jeopardy absent equal treatment of like services.

IV. THE COMMISSION SHOULD EXPAND THE BASE OF USF CONTRIBUTORS TO INCLUDE ALL BROADBAND INTERNET ACCESS SERVICE PROVIDERS

In the *Wireline Broadband NPRM*,²⁸ the Commission sought comment on whether other facilities-based broadband Internet access providers (e.g., wireless, cable and satellite providers that supply last-mile connectivity over their own facilities based upon their self-provision of telecommunications) should be required to contribute to universal service pursuant to the FCC's mandatory or permissive authority.²⁹ In this proceeding, the Commission seeks to broaden the inquiry in the *Wireline Broadband NPRM* by asking commenters to address whether USF contribution obligations should apply to both facilities-based and non-facilities-based providers

²⁷ 47 U.S.C. §254(d).

²⁸ *In the Matter of Appropriate Framework For Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, *Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings; Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Dockets Nos. 95-20, 98-10, Notice of Proposed Rulemaking, FCC 02-42 (rel. February 15, 2002)(*Wireline Broadband NPRM*).

²⁹ *NPRM*, ¶ 63.

of VoIP and IP-enabled services.³⁰ NTCA believes that Congressional goals will best be served if the Commission expands the list of USF contributors to include both facilities-based and non-facilities-based VoIP/IP-enabled service providers and all providers of broadband transmission, regardless of the classification of broadband transmission service as an information service, telecommunications service or private carriage service.

In a separate proceeding, NTCA argued that the universal service contribution base should include cable, wireless and satellite carriers who use their platforms to provide broadband Internet access services.³¹ NTCA pointed out that the current rules put rate-of-return (ROR) rural ILECs at a competitive disadvantage. Rural ILECs are required to make universal service contributions to the extent they provide broadband transmission services or other telecommunications services on a stand-alone basis to affiliated or non-affiliated Internet service providers or end-users. These requirements, however, do not apply to cable, wireless, or satellite providers of broadband transmission services or other providers of broadband access service.

To achieve competitive neutrality, all facilities-based broadband providers should be treated alike and contribute to the universal service fund. Even if the Commission does not define these services as “telecommunication services,” it has the authority and should assess the services for universal service. As technology changes, the consumer will be unable to distinguish the service and features of one type of provider from another. Different facilities and technologies are emerging as substitutes for traditional circuit switched telecommunications services and broadband Internet access services. Interstate traffic is migrating to these facilities

³⁰ NPRM, ¶ 63.

³¹ See Reply Comments of NTCA, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 02-41, (submitted April 25, 2002).

and the carriers that operate them. These same carriers are benefiting from the nation-wide network made possible by universal service. Assessing only ILEC services will place these carriers at a distinct competitive disadvantage and defeat the overall goal of promoting universal service and the deployment of broadband throughout the United States.³²

If the Commission concludes that certain types of VoIP service, IP-enabled service or broadband Internet access service offered on an integrated basis are “information services,” it should use its permissive authority to assess the telecommunications component of this service.³³ Cable, wireless, wireline, and satellite providers, who provide information service, should be assessed USF contributions regardless of the classification of broadband transmission service as an information service, telecommunications service or private carriage service. The same is true for facilities-based and non-facilities-based VoIP/IP-enabled service providers. Carriers and providers that benefit from universal service should not escape the obligation of support just because they bundle services or their service escapes designation as “telecommunications service.”

The technology that consumers want and expect to have access to is changing. As Congress anticipated, the current definition of universal service must evolve to keep pace with the consumer need. Universal service support ensures comparable and affordable services

³² Sections 254(b) and (d) of the Act.

³³ *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003) petitions for rehearing pending. The FCC issued a declaratory ruling that “cable modem service, as it is currently offered, is properly classified as an interstate information service, not a cable service, and there is no separate offering of telecommunications service.” This ruling contradicted the Court’s previous ruling which found that cable modem broadband service as containing both “information service” and “telecommunications service” components. The Court determined that because the “transmission element of cable broadband service constitutes a telecommunications service under terms of the Communications Act,” the portion of the FCC’s ruling that held that the service was a exclusively an “information service” must be vacated and remanded the case back to the FCC for further proceedings consistent with the Court’s ruling.

throughout the nation. Cable, wireless and satellite providers of broadband Internet access and VoIP/IP-enabled service providers will interconnect with or utilize the PSTN and benefit from the nationwide network made possible by universal service. They should therefore all contribute to the universal service funding mechanisms. Expanding the list of contributors to the fund will be critical to this Nation's continued success in providing all Americans, rural and urban, access to affordable and comparable communications services.

V. THE COMMISSION SHOULD PERMIT OPTIONAL TARIFFING OF BROADBAND TRANSPORT SERVICES FOR RURAL ILECS

The Commission seeks comment on the economic regulation, including tariffing, of IP-enabled services.³⁴ The Commission also seeks comment on SBC's petition seeking forbearance from Title II regulation of the "IP platform" and associated services.³⁵ NTCA cautions the Commission that mandatory detariffing of broadband transmission will not foster broadband investment for all carriers. If it changes the regulatory classification of broadband transmission services, the Commission should adopt a flexible approach that permits tariffing with pricing flexibility for those carriers who choose to remain under rate-of-return regulation.

Rate-of-return (ROR) regulation enables independent rural ILECs to obtain the capital necessary to build, operate and maintain telecommunications facilities. ROR regulation minimizes the risks involved, providing investors and lenders a reasonable degree of assurance that the rural incumbent LEC will remain financially solvent. ROR regulation has helped small

³⁴ NPRM, ¶¶ 73-74.

³⁵ Pleading Cycle Established for Comments on Petition of SBC Communications Inc. for Forbearance Under Section 10 of the Communications Act from Application of Title II Common Carrier Regulation to "IP Platform Services," ("SBC Petition") WC Docket No. 04-29, DA 04-360, (rel. Feb. 12, 2004), *comment period extended*, DA 04-899 (rel. Mar. 30, 2004).

and rural carriers grow and provide quality, reliable and affordable telecommunications services to rural America.

The NECA pooling structure, in place for the last two decades, similarly works as a stabilizing factor for small carriers by reducing administrative costs, creating incentives and spreading the substantial risks of investing in rural areas among its participants. ROR regulation and the pooling structure have enabled rural carriers to not only survive, but to thrive. Americans living in remote and difficult to serve regions of the United States have access to state of the art telecommunications services because they have been under a regime that allows them to recover their investment and a reasonable return.

Given intense competition from cable broadband providers as well as other broadband technologies, relaxing regulatory restrictions on DSL services will allow some DSL transmission providers to compete on a more level playing field. Some ROR carriers, however, face different challenges and market conditions than their urban counterparts. The tariffing of broadband transport within the NECA pool permits ROR carriers to share risks and offer xDSL services at attractive rates.

Many ROR regulated rural incumbent LECs are offering xDSL today.³⁶ However, ubiquitous deployment is very costly. The upgrading of certain long loops is estimated to cost almost \$10,000 per loop.³⁷ Full deployment requires a substantial investment, yet rural carriers lack the subscribers over which to spread the cost. Without the pool, many rural carriers would be forced to forego providing high-speed service because they would have to price it out of the range of affordability. The rural consumer would suffer and lag technologically behind those

³⁶ NTCA 2003 Internet/Broadband Availability Survey, available at www.ntca.org.

³⁷ NECA Rural Broadband Cost Study: Summary of Results, p. 4 (June 21, 2000).

residing in urban areas, counter to the expressed goals of the Act. While not all wireline broadband Internet access service will currently meet the Commission's definition of "advanced telecommunication service,"³⁸ the existence of the NECA pools is a necessary predecessor to advanced services roll out. The Commission should not abandon policies and practices that have promoted broadband deployment in rural areas. The Commission should therefore adopt a flexible approach that permits tariffing with pricing flexibility for those carriers who choose to remain under rate-of-return regulation and require all providers of broadband transmission to make USF contributions, regardless of the classification of broadband transmission service as an information service, telecommunications service or private carriage service.

VI. SIMILAR 911, CALEA, AND DISABILITY ACCESS OBLIGATIONS SHOULD APPLY TO VoIP PROVIDERS

The FCC's principle of competitive neutrality requires that rules neither unfairly advantage or disadvantage one provider over another and neither unfairly favor or disfavor one technology over another. Given that landline, wireless and VoIP providers provide similar voice services, the Commission should require VoIP providers to adhere to similar regulatory obligations, including 911, CALEA, and disability access or provide other alternatives that meet the public's interest in security and safety. No provider of voice communications services, regardless of the technology used to provide the service, should have an unfair competitive advantage in the marketplace.

³⁸ The Commission has defined "advanced telecommunications capability" as "having the capability of supporting, in both the provider-to customer (downstream) and the customer-to-provider (upstream) directions, a speed (in technical terms, 'bandwidth') in excess of 200 kilobits per second (kbps) in the last mile." *Second Section 706 Report*, 15 FCC Rcd at 20919-20.

These obligations are for the benefit of consumers and homeland security. Consumers should not be denied the protection of these laws just because substitutes for services have developed. Similarly, an evenhanded approach to CALEA will ensure that law enforcement is assisted regardless of the type of provider rendering service to the consumer. Imposing similar 911, CALEA and disability access obligations on VoIP providers will promote public safety and ensure competitive neutrality.

Furthermore, in most cases the telephone industry is responsible for backup power to the telephones so that customers can make and receive calls during an electric company power outage. Many rural ILECs are required to provide alternative power sources to keep their customers lines up and running during an outage. Rural ILECs incur these costs to provide reliable service to their customers in emergency situations. VoIP and IP-enabled service providers, however, do not incur these costs, but they benefit from the underlying ILEC broadband connections to provide their customers the ability to communicate during a power outage. Given that VoIP and IP-enabled service providers benefit from ILEC backup power systems, they should not only adhere to similar 911, CALEA and disability access obligations but also make USF contributions in support of the underlying ILEC networks that carry VoIP and IP-enabled traffic during power outages and emergency situations.

VII. THE COMMISSION SHOULD REFRAIN FROM ASSERTING EXCLUSIVE FEDERAL JURISDICTION OVER ALL VoIP AND IP-ENABLED SERVICES

The Commission has previously asserted exclusive federal jurisdiction over a specific VoIP service offered by Pulver.com and a specific IP-enabled voice service offered by AT&T.³⁹ The Commission, however, has not yet issued a ruling on the jurisdiction of other types of VoIP and IP-enabled services. The Commission should refrain from asserting exclusive federal jurisdiction over all VoIP and IP-enabled services at this time. Congress is currently considering this issue and will likely provide clear guidance concerning state and federal jurisdiction as part of new telecom legislation expected in the future.⁴⁰ If the Commission asserts exclusive federal jurisdiction over all forms of VoIP and/or IP-enabled services in this proceeding it may be required to reverse itself in the near future. To avoid such an outcome, the Commission should allow for the possibility that some VoIP and IP-enabled services may fall under exclusive state jurisdiction or shared state and federal jurisdiction.

The Act also provides the states with the authority to regulate entry and to ensure that competitive entry in rural areas does not harm universal service or impede the delivery of high quality telecommunications services.⁴² The possible classification of VoIP and other IP-enabled services as “information services” subject to the exclusive federal jurisdiction has the potential to

³⁹ *In the Matter of Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, FCC 04-27, (rel. Feb. 19, 2004); *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97 (rel. April 21, 2004).

⁴⁰ Senator Sununu and Congressman Pickering have drafted separate bills this year to “provide a clear and unambiguous structure for the jurisdictional and regulatory treatment for the offering or provision of voice-over-Internet-protocol applications.” Senate Bill No. 2281 and House of Representatives Bill No. 4129.

⁴² 47 U.S.C. § 253(b)

deprive the states of the ability to regulate entry through the certification process and to enforce Section 253(b)(3). At least one state has decided that a certificate of Public Convenience and Necessity (CPCN) is required.⁴³ NTCA urges the Commission to consider this potential effect of such a ruling and take precautions to ensure that the states preserve their ability to decide what carriers may obtain certificates of public convenience and necessity and to impose public interest and additional safeguards on all entrants. This is necessary to ensure that subscribers of services typically certificated by the states continue to receive the benefits of universal service. The rush to replace state authority with federal authority could harm the public, interfere with legitimate state authority, and ultimately retard universal service if states are deprived of their traditional ability to issue certificates and to impose conditions to safeguard universal service pursuant to Section 253.

Moreover, when the Commission asserted exclusive federal jurisdiction over Pulver.com's VoIP service, it relied in part on sections 230 and 706 of the Act as the basis for such jurisdiction. Section 230 is the *Protection For Private Blocking and Screening of Offensive Material* section of the Act and defines the Internet as the "international network of both federal and non-federal interoperable packet switched data networks." Non-federal interoperable packet switched data networks implies that these networks include state interoperable packet switched data networks. Section 230(d)(4), also states that "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section." Section 230 recognizes that states have jurisdiction over certain services provided over the Internet. The Commission should not assume that state laws regulating entry or other consumer aspects of

⁴³ New York Public Service Commission (NYPSC) Order Establishing Balanced Regulatory Framework for Vonage Holding Corporation, NYPSC Case No. 03-C-1285, (issued and effective May 21, 2004).

service is inconsistent with Section 230, a section of the Act principally aimed at giving parents tools to protect children from access to offensive material on the Internet.

Section 706, the *Advanced Telecommunications Incentives* section of the Act, also assumes a state role in the promotion of advanced services. It states that the “Commission and **each state commission** with regulatory jurisdiction over the telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” [emphasis added]. Congress clearly envisioned in this section the possibility of the FCC and state commissions sharing jurisdiction over the deployment of advanced telecommunications services.

The Commission has also recognized that if an information service is characterized as “purely intrastate” or “it is practically and economically possible to separate interstate and intrastate components of a jurisdictionally mixed information service without negating the federal objectives,” state commission jurisdiction could apply over such services.⁴⁴ With the creation of new IP-based services it will be possible to identify “purely intrastate” VoIP and IP-enabled services. It will also be possible to easily track the intrastate and interstate components of these services. For this reason and others, the Commission should refrain from making a blanket ruling that it has exclusive federal jurisdiction over all VoIP and IP-enabled services. A blanket assertion of jurisdiction will only complicate the inter-carrier compensation NPRM, CC Docket No. 01-92, in which the Commission will have to carefully analyze the boundaries of federal and state authority over interconnecting carrier compensation arrangements.

⁴⁴ *Petition for Declaratory Ruling that Puilver.com’s Free-World Dialup is Neither Telecommunications Nor a Telecommunications Service*, ¶20, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27 (Feb. 19, 2004).

Finally, the Commission should be careful not assert exclusive federal jurisdiction, particularly given VoIP's obvious use of local networks. In *Smith v. Illinois*, the Supreme Court stated that "proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction" to determine whether rates would result in confiscation.⁴⁵ The Court held that when distinct jurisdictional limits exist as to the determination of reasonable rates, some form of jurisdictional separations must occur. The Court further established that "reasonable measures [are] essential" and indicated that such measures should not "ignore altogether the actual uses to which the property is put."⁴⁶ The Commission's actions should therefore take into consideration state commission jurisdiction and the separation of carrier property and expenses between interstate and intrastate operations in order to avoid issues of preemption and confiscation.

VIII. THE ESP EXEMPTION SHOULD BE ELIMINATED

Since 1983, the Commission has exempted enhanced service providers (ESPs) from the payment of certain interstate access charges.⁴⁷ Consequently ESPs, including Internet service providers (ISPs), are treated as end-users for the purpose of applying access charges and are, therefore, entitled to pay local business rates for their connections to LEC central offices and the PSTN.⁴⁸ Despite the Commission's understanding that ISPs use interstate access services, the

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ This policy is known as the "ESP exemption." See *MTS/WATS Market Structure Order*, 97 FCC 2d at 715 (ESPs have been paying local business service rates for their interstate access); see also Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2633 (1988) (*ESP Exemption Order*).

⁴⁸ *ESP Exemption Order*, 3 FCC Rcd at 2635 n.8, 2637 n.53. See also *Access Charge Reform Order*, 12 FCC Rcd at 16133-35.

Commission has permitted ISPs to take service under local tariffs and avoid paying interstate access charges and USF contributions.

In 1997, the Commission reconfirmed its previous finding that ISPs should not be required to pay interstate access charges at that time.⁴⁹ The Commission explained that the then existing access charge system included non-cost-based rates and inefficient rate structures.⁵⁰ The Commission further reasoned that ISP purchases of tariffed primary and secondary lines provided ILECs with revenues for the costs imposed on their networks by ISPs.⁵¹

It is time to remove the ESP exemption for ISPs. The alleged non-cost based rates and inefficient rates structures that existed in 1997 do not exist today. With the implementation of the CALLS and MAG access reform plans for non-rural and rural ILECs, interstate access charges have been reduced to historical lows. These access charges are limited to minimal traffic sensitive recovery and common line costs that are recovered from end-users and the universal service fund. Moreover, primary line growth has been flat and secondary line growth has declined. At the same time, ISP usage of the PSTN has continued to increase dramatically and has placed a significant and rapidly growing cost burden on ILECs without adequate compensation or universal service contributions from ISPs.

The ESP exemption permits carriers to sell their services to customers while benefiting from the free ride that ISPs receive as a result of the exemption. Exempting ISPs from access charges and USF contributions has increased the universal service burden on all remaining USF contributors. If VoIP services are added to the list of services exempt from access charges and

⁴⁹ *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, FCC 97-157, ¶¶ 344-348 (First Report and Order)(rel. May, 16. 1997).

⁵⁰ *Id.*

⁵¹ *Id.*

USF contributions, the entire universal service funding system will be at risk of collapsing. The Commission should therefore remove the ESP exemption and require all ISPs and VoIP and IP-enabled service providers using the PSTN, to pay access charges and universal service contributions. Even if the exemption is not removed for other ESPs, VoIP providers should, for the reasons stated parts II, III, and IV, not be exempt in any event.

IX. CONCLUSION

Based on the above reasons, the Commission should find that:

- (1) all VoIP and IP-enabled service providers are subject to the same inter-carrier compensation obligations as IXC's, irrespective of whether the traffic originates on the PSTN, on an IP network, on a wireless network, or on a cable network;
- (2) all VoIP and IP-enabled service providers, regardless of their service's regulatory classification as either an "information service," "telecommunications service," "cable service," or "wireless service" are required to contribute to the universal service fund to ensure that all Americans have access to affordable communications services;
- (3) all VoIP providers are required to adhere to similar regulatory obligations to provide consumers with 911 service, CALEA compliance and disability access, or require VoIP providers to provide other alternatives that meet the public's interest in security and safety;
- (4) it is in the best interest of consumers to refrain from asserting exclusive federal jurisdiction over all VoIP and IP-enabled services and allow for the possibility that some VoIP and IP-enabled services may fall under exclusive state jurisdiction or shared state and federal jurisdiction;
- (5) it is time to eliminate the ESP exemption for ISPs;
- (6) the current definition of universal service must evolve to keep pace with consumer needs and evolving technology;
- (7) rural ILECs who choose to remain on rate-of-return regulation should be permitted broadband transmission tariffing with pricing flexibility; and
- (8) the list of USF contributors must expand to include cable, wireless and satellite providers of broadband Internet access and facilities-based and non-facilities-

based VoIP and IP-enabled service providers to ensure this Nation's continued success in providing all Americans, rural and urban, access to affordable and comparable communications services.

Even if all VoIP and IP-enabled services were accommodated on broadband-only-facilities, the costs of these facilities are still higher in rural areas. Some form of access and/or universal service will be needed to ensure that rural consumers continue to receive access to advanced telecommunications and information services that are reasonably comparable in rural and urban areas of the United States.

Respectfully submitted,

NATIONAL TELECOMMUNICATIONS
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CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in WC Docket No. 04-36, FCC 04-28 was served on this 28th day of May 2004 by first-class, U.S. Mail, postage prepaid, to the following persons.

/s/ Gail Malloy

Gail Malloy

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